

# SIMILARITIES BETWEEN ARBITRATION AND BANKRUPTCY LITIGATION

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I am one of very few law professors in the United States who regularly teaches courses in both bankruptcy law and arbitration law, or more generally, Alternative Dispute Resolution.<sup>1</sup> Apparently, most law professors with a strong interest in bankruptcy lack a strong interest in arbitration and vice versa. Perhaps many law professors believe that these two fields, bankruptcy law and arbitration law, have little in common. One thing they do have in common, though, is that they are not Civil Procedure.<sup>2</sup>

The Federal Rules of Civil Procedure (the Federal Rules) are appropriately central to the study of civil procedure in the United States because they govern civil litigation in most federal courts and they have greatly influenced state courts' rules of procedure as well.<sup>3</sup> In important respects, though, the litigation process in bankruptcy courts differs from the litigation process under the Federal Rules. And the bankruptcy litigation process differs from the Federal Rules in many of the same ways that the arbitration process tends to differ from the Federal Rules. This Article explores these similarities between the procedures of bankruptcy litigation and arbitration and contrasts them with the more-elaborate procedures of ordinary civil litigation under the Federal Rules.

While some of these similarities and contrasts appear on the face of the various written rules of procedure, others appear only when one looks beyond the written rules to unwritten customary practices. In other words, the "law in

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<sup>1</sup> Compare ASS'N OF AM. LAW SCH., 2009-2010 DIRECTORY OF LAW TEACHERS 1478-83 (2009-2010) (listing teachers of Alternative Dispute Resolution, including Arbitration, Mediation and Negotiation), with *id.* at 1576-78 (listing teachers of creditors' and debtors' rights courses, including Bankruptcy).

<sup>2</sup> Here, I do not mean to take a side in the bankruptcy-is-primarily-procedure debate. See, e.g., Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 617-20 (2008) (placing bankruptcy theories on a continuum from "proceduralists," who view bankruptcy "as a process that sorts out nonbankruptcy entitlements, which are largely creatures of state private law," to "statists" who "would generally give Congress and bankruptcy courts greater power to adjust debtor-creditor relations."). See generally Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004) (arguing bankruptcy is procedure). Rather than addressing this debate, I am making the (very different) claims that appear in the next paragraph of text.

<sup>3</sup> See, e.g., Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 (1987) ("Approximately half of the states adopted almost identical rules, and procedural rules in the remainder of the states bear their influence.").

action” differs somewhat from the “law in the books” with respect to procedures in the three forms of adjudication compared here: (1) ordinary civil litigation, (2) bankruptcy litigation, and (3) arbitration.<sup>4</sup>

Part I of this Article briefly summarizes the procedures of ordinary civil litigation under the Federal Rules and introduces the concept of “process costs,” the costs parties incur using a process of adjudication. Compared to ordinary civil litigation under the Federal Rules, both bankruptcy litigation and arbitration use procedures well-suited to providing quicker and cheaper adjudication, with correspondingly lower process costs. Part II details some of those procedures in bankruptcy litigation and contrasts them with ordinary (non-bankruptcy) civil litigation under the Federal Rules. Part III details some of the procedures of arbitration, showing how they resemble bankruptcy litigation procedures in departing from the Federal Rules in many of the same ways. Part IV suggests some questions that might be drawn from these resemblances. The first such question is whether the Federal Rules should be amended to become more like the rules that make bankruptcy litigation and arbitration quicker and cheaper than ordinary civil litigation under the Federal Rules. Second, Part IV asks why a party might choose arbitration over bankruptcy litigation when they are both similar in the ways they save process costs.

#### I. THE PROCESS COSTS OF THREE FORMS OF ADJUDICATION

Readers of this Article are likely veterans of a Civil Procedure course, and so presumably have a basic understanding of ordinary civil litigation under the Federal Rules and similar state rules of procedure.<sup>5</sup> A civil action under the Federal Rules, if it is not settled or voluntarily dismissed by the plaintiff, generally includes the following procedures:

1. Service of process to commence the action
2. Pleadings (a complaint and, typically, an answer or motion to dismiss)
3. Discovery of information prior to trial
4. Summary judgment motions (in some cases)
5. Trial, and perhaps
6. Appeal<sup>6</sup>

Of course, these procedures come at a cost to the disputing parties. A party’s “process costs” include the time and money that party spends on these procedures.<sup>7</sup>

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<sup>4</sup> Of course, there is nothing new in recognizing that the law in action does not necessarily correspond to the law in the books. See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14-15 (1910).

<sup>5</sup> I do not presume thorough knowledge of the Federal Rules or any other specific rules of procedure, but rather presume only a rough familiarity with the basic purposes of the six procedures listed *infra* note 6 and accompanying text.

<sup>6</sup> See JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 4-18 (Thomson/West, rev. 9th ed. 2008) (1968) (outlining the procedure in a civil action).

<sup>7</sup> One might also acknowledge as process costs the less-easily-quantified costs of adjudication, such as “a grueling deposition . . . by hostile lawyers, or a trial in which the client’s family secrets are exposed to the public.” STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* § 3.5(b) (2d ed. 2007) [hereinafter WARE, *PRINCIPLES*]. Process costs should be distinguished from the costs of paying a money judgment or complying with any

Compared to ordinary civil litigation under the Federal Rules, bankruptcy litigation uses procedures well-suited to providing quicker and cheaper adjudication, with correspondingly lower process costs. The relative speed of bankruptcy litigation is noteworthy, as it tends to move more quickly than non-bankruptcy litigation, with a shortened discovery process and an earlier hearing.<sup>8</sup> Bankruptcy law professors Elizabeth Warren and Jay Westbrook observe:

[D]etailed fact-finding and dispute resolution is routinely handled by the bankruptcy courts in a relatively short time. Courts will usually consider the papers filed by the parties and schedule an hour or two to hear evidence. A dispute that might drift through the state court for years may be resolved within a matter of weeks in a bankruptcy forum.<sup>9</sup>

The force of this observation can be appreciated by considering the large number of cases to which it applies. Consider, for example, a breach-of-contract claim in which the defendant contends that it performed, rather than breached, the contract and, in the alternative, if it did breach then damages are much lower than the plaintiff asserts. This fact pattern can serve as the paradigm for the sort of common, everyday case to which Warren and Westbrook's observation about bankruptcy litigation's speed applies.<sup>10</sup> In other words, the speed of bankruptcy litigation applies not just to the occasional case, but to large numbers of the run-of-the-mill cases. This speed is crucial because "[p]rolonged case disposition time frequently correlates with an increase in litigation costs."<sup>11</sup> In sum, process costs generally tend to be lower in bankruptcy litigation, due to its speed and less elaborate procedures.<sup>12</sup>

Similarly, the consensus is that arbitration tends to be quicker than ordinary civil litigation<sup>13</sup> and thus also likely reduces process costs.<sup>14</sup> What War-

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other remedy ordered by the court. See Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 747 (2001) (explaining the difference between the remedy costs and process costs).

<sup>8</sup> Chapter 11—"101": An Overview of Bankruptcy Litigation, AM. BANKR. INST. J., Feb. 2004, at 16 ("[T]hings generally move at a much faster pace in bankruptcy than in non-bankruptcy litigation.") [hereinafter *Overview of Bankruptcy Litigation*]; C. Daniel Mot-singer, *Life in the Fire House: Representing Creditors in Bankruptcy Cases*, in BANKRUPTCY LITIGATION AND DISPUTE RESOLUTION 97, 107 (2008) ("Bankruptcy litigation tends to move more quickly, involve a shorter discovery process, [and] get to trial or hearing faster . . . than other forms of litigation.").

<sup>9</sup> ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 221 (6th ed. 2009).

<sup>10</sup> If the defendant in this contract case is in bankruptcy then the plaintiff's claim will be heard as a contested matter. See *infra* note 31 and accompanying text.

<sup>11</sup> Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 814-15 (2000); see also CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 28 (2d ed. 2006) ("[O]ne would expect cost and speed to be closely related, if for no other reason than that delay is costly.").

<sup>12</sup> See *infra* Part II (discussing less elaborate procedures of bankruptcy litigation).

<sup>13</sup> Countless lawyers observe that arbitration tends to be faster than litigation. See DAVID B. LIPSKY & RONALD L. SEEGER, *THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS* 17, 26 (1998); see also DRAHOZAL, *supra* note 11, at 27-28 (quoting LIPSKY & SEEGER, *supra*, at 26); Arthur D. Felsenfeld, *International ADR Developments: Innovative Approaches to Resolving New Types of Disputes*, in EMERGING APPLICATIONS FOR ADR 41 (2010) ("[I]t is my experience

ren and Westbrook say above about the speed of bankruptcy litigation, in which disputes are often “resolved within a matter of weeks,”<sup>15</sup> can also be said, although to a lesser degree, about arbitration. While most cases in arbitration are not resolved within a matter of weeks, some are.<sup>16</sup> And the general speed advantage of arbitration over ordinary civil litigation applies not just to the occasional case, but to large numbers of run-of-the-mill cases, including cases like the paradigmatic breach-of-contract case noted above.<sup>17</sup> In sum, arbitration generally uses procedures that, like those of bankruptcy litigation, are

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that properly managed arbitration can be completed more quickly than litigation. Few arbitrators have a caseload comparable to the overcrowded docket of a state or federal judge and therefore can more easily accommodate the parties’ desire for a quick resolution to their disputes. The fact that discovery tends to be more limited in arbitration also contributes to the speed of resolution, as well as the cost savings.”); Eric Alan Stone & Jacqueline P. Rubin, *Drafting Corporate Agreements: A Litigator’s Perspective*, in DRAFTING CORPORATE AGREEMENTS 483, 498 (2010) (explaining arbitration “is, generally speaking, faster”); David S. Steuer, *A Litigator’s Perspective on the Drafting of Commercial Contracts*, in DRAFTING CORPORATE AGREEMENTS, *supra*, at 459, 467 (“Arbitration normally proceeds faster than litigation . . . .”); Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 5, 5 n.12 (collecting studies and finding that “business lawyers tend to view arbitration more favorably than litigation in key categories (fairness, speed to resolution, and cost).”). *But see* Christian A. Atwood, *Creative Approaches to Financing Private Company M&A in a Brave New (Unlevered) World*, in DEALING WITH M&A FINANCING AND RISK IN A CHANGING MARKET 25, 33 (2010) (“We usually eschew arbitration due to the unpredictability of the outcome and (at least based on our experience) the fact that arbitration is usually no faster or less expensive than litigation.”).

<sup>14</sup> I have argued that arbitration’s process costs tend to be lower than litigation’s. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 258-62 (2006) (collecting studies); *see also* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 840 (2008) (“Survey evidence and business experience provides some evidence that the total costs of arbitration are lower than in litigation, but the evidence is too limited to draw definitive conclusions.”); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL’Y 549, 579 (2008) (“Virtually all of the available evidence—studies of analogous regimes, surveys, and case studies—suggests . . . that arbitration, as a necessary part of a broader fabric of alternative-dispute-resolution programs, can significantly reduce a company’s process costs.”); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1268 (2009) (“[L]imits on discovery (and to a lesser extent on pretrial motion practice) hold down the actual costs of arbitration relative to litigation.”).

<sup>15</sup> WARREN & WESTBROOK, *supra* note 9, at 221.

<sup>16</sup> *See, e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1731 (2001) (“At the [cotton industry arbitration tribunal], the rules require the time from filing to the close of evidence to be between fifteen and thirty days. Decisions are rendered as soon thereafter as possible. At the [Memphis Cotton Exchange], the length of time from filing to disposition varies but is typically just over a month.”) (footnotes omitted); Michael Peel & Jane Croft, *Arbitration: Case Closed*, FT.COM (Apr. 15, 2010, 7:55 PM), <http://www.ft.com/cms/s/0/1858447c-48be-11df-8af4-00144feab49a.html#axzz1EdSqZYhO> (noting the benefits of international arbitration, “Elizabeth Birch, a barrister and arbitrator, says: ‘I was involved in an IT case in which parties needed an urgent decision—and that was dealt with in two weeks, compared with what I would estimate could have taken 18 months or two years in court.’”).

<sup>17</sup> *See supra* text accompanying notes 9-10.

quicker and less elaborate than the procedures of ordinary civil litigation under the Federal Rules.<sup>18</sup>

## II. BANKRUPTCY LITIGATION PROCEDURE

### A. *The Basic Context*

A “case” in bankruptcy is fundamentally different from a “case” in ordinary civil litigation.<sup>19</sup> While an ordinary civil case is adversarial from the start, as indicated by the caption in the style of *Plaintiff v. Defendant*, “[a] ‘case’ in bankruptcy parlance is the bankruptcy as a whole[,]”<sup>20</sup> as indicated by the caption in the style of *In re Debtor’s Name*. While a bankruptcy case may have one or more adversarial “cases-within-a-case,”<sup>21</sup> most do not. “[I]n most bankruptcies, there is no active conflict and the case is ‘administrative’ from start to finish.”<sup>22</sup> If, however, a dispute arises in the course of a bankruptcy case, then litigation may occur.

The two most common types of bankruptcy litigation are the “adversary proceeding” and the “contested matter.”<sup>23</sup> The distinction between the two is fundamental to bankruptcy procedure.<sup>24</sup> An adversary proceeding<sup>25</sup> is an “ordinary lawsuit that is tried in the federal bankruptcy court under essentially the same rules of procedure as a ‘civil action’ in a federal district court.”<sup>26</sup>

<sup>18</sup> See *infra* Part III (discussing arbitration’s less elaborate procedures).

<sup>19</sup> 8 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON, III, *NORTON BANKRUPTCY LAW AND PRACTICE* § 160:2 (3d ed. 2009).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 160:1 (internal quotation marks omitted).

<sup>22</sup> *Id.* § 160:2.

<sup>23</sup> *Id.* § 160:3 (internal quotation marks omitted); see also LAWRENCE R. AHERN, III & NANCY FRAAS MACLEAN, *BANKRUPTCY PROCEDURE MANUAL* § 7001:1 (2010) (dividing bankruptcy disputes into three categories: adversary proceedings, contested matters, and “administrative proceedings.”); 10 COLLIER ON BANKRUPTCY ¶ 9014.01 (Lawrence P. King ed., 15th ed. rev. 2010) (dividing bankruptcy disputes into three categories: adversary proceedings, contested matters, and “administrative matters, in which there is no adversary party.”). One might also add “contested petitions.” Christopher M. Klein, *Bankruptcy Rules Made Easy* (2001): *A Guide to the Federal Rules of Civil Procedure that Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35, 36 (2001). The petition in bankruptcy, which commences a bankruptcy case, is occasionally contested, most often in the case of an involuntary bankruptcy. Such contested petitions are “uncommon.” *Id.* at 42.

<sup>24</sup> 8 NORTON & NORTON, *supra* note 19, § 160:5.

<sup>25</sup> AHERN & MACLEAN, *supra* note 23, § 7001:1. Adversary proceedings include actions to “determine the validity, priority, or extent of a lien or other interest in property”; “determine the dischargeability of a debt”; “object to or revoke a discharge”; “revoke an order of confirmation of a . . . plan”; and most actions “to recover money or property.” See FED. R. BANKR. P. 7001(1), (2), (4)-(6).

<sup>26</sup> Klein, *supra* note 23, at 38; see also 8 NORTON & NORTON, *supra* note 19, § 160:4 (“The adversary proceeding is the bankruptcy action that most resembles an ordinary lawsuit under the Federal Rules of Civil Procedure.”); WARREN & WESTBROOK, *supra* note 9, at 108 (“Adversary proceedings are full-blown federal lawsuits within the larger bankruptcy case . . . .”); Section 1120(A)(1) Comm. of Unsecured Creditors v. Interfirst Bank Dall., N.A. (*In re Wood & Locker, Inc.*), 868 F.2d 139, 142 (5th Cir. 1989) (“Adversary proceedings have been correctly described as full blown federal lawsuits within the larger bankruptcy case . . . .”) (internal quotation marks omitted). Thus, “based on the premise that to the extent possible practice before the bankruptcy courts and the district court should be the same[,]”

Rules 7001-7087 of the Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules) contain most of the rules governing adversary proceedings and these rules “generally incorporate the Federal Rules of Civil Procedure.”<sup>27</sup>

By contrast, the contested matter is “subject to the less elaborate procedures described in [Bankruptcy] Rule 9014.”<sup>28</sup> The contested matter “is, by a wide margin, the most common form of bankruptcy litigation[,]”<sup>29</sup> encompassing many common bankruptcy disputes,<sup>30</sup> including, if the defendant is in bankruptcy, the paradigm breach-of-contract case described in Part I.<sup>31</sup>

In short, the most common form of bankruptcy litigation, the contested matter, is, when compared to a civil action under the Federal Rules, characterized by less elaborate procedures and an emphasis on speed. These features

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the bankruptcy rules governing adversary proceedings “either incorporate or are adaptations of most of the Federal Rules of Civil Procedure.” FED. R. BANKR. P. 7001 advisory committee’s note; *see also In re Pub. Serv. Co. of N.H.*, 898 F.2d 1, 2 (1st Cir. 1990) (“[T]he bankruptcy rules . . . draw strong analogies between an ‘adversary proceeding’ in bankruptcy and an ordinary ‘case’ in a district court.”).

In some ways, however, the procedural rules governing adversary proceedings are more streamlined than those found in the Federal Rules of Civil Procedure. This is true, for example, with service of process. In addition to the methods of service permitted under Federal Rule 4, Bankruptcy Rule 7004 permits service by first class mail. FED. R. BANKR. P. 7004(b). Also, service of process is nationwide. FED. R. BANKR. P. 7004(d). Thus, in bankruptcy cases an adversary complaint can be served anywhere in the United States by first class mail. So-called “personal service” by a process server is unnecessary.

<sup>27</sup> Scott A. Wolfson, Commentary, *A Roadmap for Bankruptcy Litigation*, ANDREWS LITIG. REP. BANKR., Dec. 12, 2008, at 3, 4. Wolfson further notes: “For example, Bankruptcy Rule 7003 simply states, ‘Rule 3 Fed.R.Civ.Proc. applies in adversary proceedings.’ However, some of the Bankruptcy Rules differ from the Federal Rules of Civil Procedure, with the modifications ranging from slight to dramatic.” *Id.*

<sup>28</sup> WARREN & WESTBROOK, *supra* note 9, at 108; *see also Overview of Bankruptcy Litigation*, *supra* note 8, at 16 (“Contested matters tend to proceed more quickly—and somewhat less formally—than adversary proceedings, although they can still result in discovery and in trials before the bankruptcy judge.”).

<sup>29</sup> Klein, *supra* note 23, at 39; *see also* Wolfson, *supra* note 27, at 5 (“Most bankruptcy court litigation practice is conducted through contested matters.”). For a list of specific motions, objections and applications defined, or referred to, in the Bankruptcy Rules as contested matters, *see* Klein, *supra* note 23, at 39-41.

<sup>30</sup> Examples include: relief from the automatic stay, compelling the debtor to turn over property to a trustee, compelling an estate representative to abandon the estate’s interest in property, avoiding liens in exempt property, confirmation or modification of a Chapter 12 or 13 plan, and objection to the confirmation of a debtor’s proposed plan. AHERN & MACLEAN, *supra* note 23, § 9014:1; 3 ROSEMARY E. WILLIAMS, BANKRUPTCY PRACTICE HANDBOOK § 18:8 (2d ed. 2010).

<sup>31</sup> *See* AHERN & MACLEAN, *supra* note 23, § 9014:1 (listing ‘objection to claim’ as a contested matter). Neither the filing of a proof of claim in bankruptcy nor an objection to claim trigger an adversary proceeding. *See, e.g.*, 10 COLLIER ON BANKRUPTCY, *supra* note 23, ¶ 7001.01 (“The filing and subsequent allowance of a proof of claim ordinarily does not commence an adversary proceeding even if priority or security is also claimed. The filing of an objection to the allowance of a claim is governed by [Bankruptcy] Rule 3007 and commences a contested matter governed by Rule 9014.”); *see also* FED. R. BANKR. P. 3007, advisory committee’s note (“The contested matter initiated by an objection to a claim is governed by rule 9014, unless a counterclaim by the trustee is joined with the objection to the claim. The filing of a counterclaim ordinarily commences an adversary proceeding subject to the rules in Part VII.”).

result primarily from the fact that contested matters are treated as motions.<sup>32</sup> As one bankruptcy practitioner explains,

[M]ost contested matters proceed with a single motion, memorandum in opposition, and reply memorandum, and a single hearing, without the need for more complicated procedures. If the dispute is factual in nature, the court may hold an “evidentiary hearing” (i.e., trial) where the court hears testimony of witnesses.

Evidentiary hearings in contested matters typically differ from trials in that the issues are more limited. The court may order that the parties exchange witness and exhibit lists, or file pretrial statements. Typically, however, these are not necessary. Contested matters are motion practice. Most of the issues will be decided on the basis of memoranda, and oral argument. There is no constitutional right to a jury trial in contested matters.<sup>33</sup>

The following section summarizes some of the ways the speedy and less-elaborate procedures of contested matters reduce process costs when compared to ordinary civil litigation under the Federal Rules.

## B. Specific Procedures

### 1. Pleadings and Summary Judgment Motions

Contested matters are handled as motions. Instead of the complaint and answer used in ordinary civil litigation, the analogs to pleadings in a contested matter are the motion itself, the opposing party’s memorandum in opposition and perhaps a reply memorandum by the moving party.<sup>34</sup> In this respect, contested-matter practice under the Bankruptcy Rules resembles summary judgment practice under the Federal Rules. But, of course, summary judgment under the Federal Rules involves a motion and memoranda *after a complaint and answer*.<sup>35</sup> By contrast, the motion and memoranda in a contested matter are *instead of a complaint and answer*. So the Bankruptcy Rules skip an entire step and thus tend to increase speed and reduce process costs.

While summary judgment motions in contested matters are rare,<sup>36</sup> the speed and efficiency of summary judgment can be achieved in contested matters by simply not having an evidentiary hearing. In contested matters, “[t]here is no requirement to hold an evidentiary hearing where there are no disputed issues of material fact. Courts have also held that an evidentiary hearing was

<sup>32</sup> AHERN & MACLEAN, *supra* note 23, § 9014:3 (“[A]n adversary proceeding is commenced by *filing* a complaint with the clerk, while a contested matter is generally commenced by *service* of the motion . . . .”); Wolfson, *supra* note 27, at 5 (“Bankruptcy Rule 9014 outlines the procedures applicable to contested matters. Relief must be requested by a motion in the bankruptcy case.”).

<sup>33</sup> ELIZABETH A. KANE, *What You Should Know About Bankruptcy Procedure and Litigation*, in UNDERSTANDING THE BANKRUPTCY REFORM ACT OF 2005 IN HAWAII 19, 30-31 (2005).

<sup>34</sup> “[M]ost contested matters proceed with a single motion, memorandum in opposition, and reply memorandum, and a single hearing, without the need for more complicated procedures.” *Id.* at 30. “Counterclaims and third party practice [do] not apply” to contested matters. 1 HOWARD J. STEINBERG, *BANKRUPTCY LITIGATION* § 6:4 (2d ed. 2007).

<sup>35</sup> See FED. R. CIV. P. 56(a)-(b) (summary judgment); FED. R. CIV. P. 7(a)(1)-(2) (complaint and answer).

<sup>36</sup> “Due to the expedited nature of most contested matters, summary judgment motions are not often utilized since the underlying dispute is presented for hearing within a short time period after the contested matter is initiated.” 1 STEINBERG, *supra* note 34, § 6:18.

not necessary where there was an adequate factual record before the court prior to the hearing.”<sup>37</sup>

That said, the gist of contested-matter practice is to quickly get to a hearing, but with fewer filings (pleadings and motions) than precede a trial in ordinary civil litigation. This reduction of procedural steps in contested matters is due to the emphasis on speed in bankruptcy proceedings.<sup>38</sup>

## 2. *Discovery*

The emphasis on speed in bankruptcy is especially evident at the discovery stage of litigation. Compared to ordinary civil litigation, contested matters tend to involve less discovery and a faster pace. This is reflected in the fact that portions of Federal Rule of Civil Procedure 26 do not apply in a contested matter unless the court directs otherwise.<sup>39</sup> These are:

- Rule 26(a)(1) (mandatory disclosure)
- Rule 26(a)(2) (disclosures regarding expert testimony)
- Rule 26(a)(3)(additional pre-trial disclosure)
- Rule 26(f) (mandatory meeting before scheduling conference/discovery plan)<sup>40</sup>

These rules are excepted because they are not compatible with the speed of contested matters.<sup>41</sup> Discovery can begin immediately in contested matters because the Rule 26 disclosures do not apply.<sup>42</sup>

In addition, judges seem to be more likely to approve expedited discovery in contested matters than in ordinary civil litigation.<sup>43</sup> In a contested matter, expediting discovery is often essential because the hearing is scheduled before a response to a non-expedited discovery request would be due.<sup>44</sup> In fact, “[s]ome courts have adopted local rules that suspend application of the discovery rules in contested matters, noting that the discovery rules would delay resolution of the matters. In a number of jurisdictions, the parties simply do not follow the rules and the courts do not require strict enforcement of the rules.”<sup>45</sup>

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<sup>37</sup> *Id.* § 6:21 (footnote omitted).

<sup>38</sup> *See infra* Part II.B.2-3.

<sup>39</sup> FED. R. BANKR. P. 9014.

<sup>40</sup> FED. R. BANKR. P. 9014(c).

<sup>41</sup> 10 COLLIER ON BANKRUPTCY, *supra* note 23, ¶ 9014.05.

<sup>42</sup> Khackikyan v. Hahn (*In re Khachikyan*), 335 B.R. 121, 127 (B.A.P. 9th Cir. 2005).

<sup>43</sup> *See* 1 STEINBERG, *supra* note 34, § 4:5. Expedited discovery is part of the general sense of urgency in bankruptcy litigation:

It is not uncommon for a trial in an adversary proceeding or a hearing in a contested matter to be scheduled in a relatively short period of time after the matter is at issue. Such matters are placed on a rapid time schedule because prolonged litigation is inimical to the goal of a rapid and efficient administration of the bankruptcy estate. When such scheduling is involved, it may be necessary to engage in expedited discovery. Expedited discovery is not often granted in nonbankruptcy litigation absent extraordinary circumstances. Expedited discovery can be essential in bankruptcy litigation, and bankruptcy courts may be more likely to grant such requests.

*Id.* (footnote omitted).

<sup>44</sup> *Id.* § 6:19.

<sup>45</sup> *Id.* § 4:5 (footnote omitted).



Perhaps, too, bankruptcy lawyers are less likely than other litigators to spar over discovery.<sup>46</sup> The customary way to “play the game” of litigation in bankruptcy courts may have evolved a speed and cooperativeness that reflect all parties’ recognition that the pie over which they are fighting is too small to allow a lot of it to be consumed in procedural disputes.<sup>47</sup> As one bankruptcy court put it:

Bankruptcy must be a more self regulating practice than other areas of law. . . . [B]ankruptcy judges require maximum cooperation and tolerate minimum discovery disputes. This is because the nature of bankruptcy proceedings demands it. Within a given bankruptcy case, especially one as large as [this] proceeding, there could be thousands of disputes. If parties in these disputes refused to cooperate with discovery . . . litigation costs would swallow the estate (and the court) and there would be nothing left to distribute to creditors. Further, in most bankruptcy cases there is an expedited time frame. In chapter 11s, if some tasks are not accomplished expediently the plan could fail or the business might lose potential buyers.<sup>48</sup>

And as another bankruptcy court bluntly told a lawyer, “Your casual reference to the need for months to take discovery runs completely contrary to the manner in which bankruptcy cases are pursued.”<sup>49</sup>

### 3. *Hearing and Appeal*

Hearings on contested matters in bankruptcy tend to be faster and less elaborate than trials in ordinary civil litigation. Although the Federal Rules of Evidence apply to bankruptcy cases,<sup>50</sup> “most practitioners probably would agree that they are not strictly enforced because almost all matters are tried by the bankruptcy judge[.]”<sup>51</sup> as opposed to a jury.<sup>52</sup> Significantly, evidence in

<sup>46</sup> *Id.* § 4:4 (“Generally, bankruptcy judges have little patience for discovery disputes. Given the heightened pace of the proceedings, gamesmanship in the discovery process is an ill advised strategy.”). On the other hand, bankruptcy does offer opportunities for discovery not found in ordinary civil litigation. “Unlike in nonbankruptcy forums, a party has an opportunity to engage in types of discovery prior to engaging in litigation, such as by asking questions of the debtor at § 341(a) meeting or by conducting a Bankruptcy Rule 2004 examination.” *Id.* § 4:2. Bankruptcy Rule 2004 provides that “the court may order the examination of any entity.” FED. R. BANKR. P. 2004(a). These examinations are similar to depositions. 1 STEINBERG, *supra* note 34, § 4:25. While a bankruptcy litigant may use discovery under the Federal Rules, “Bankruptcy Rule 2004 represents a wholly separate discovery scheme.” 8 NORTON & NORTON, *supra* note 19, § 160:4.

<sup>47</sup> *Overview of Bankruptcy Litigation*, *supra* note 8, at 16 (“They say that the difference between a litigator and a bankruptcy lawyer is that the bankruptcy lawyer goes to court. This is true for one good, practical reason: The debtor in bankruptcy is sick, and if you fight too long over the patient, you’ll have nothing left but a corpse.”).

<sup>48</sup> *In re LTV Steel Co.*, 307 B.R. 37, 48 (Bankr. N.D. Ohio 2004).

<sup>49</sup> *SK-Palladin Partners, L.P. v. Platinum Entm’t, Inc.*, No. 01-C-7202, 2001 WL 1593154, at \*4 (N.D. Ill. Dec. 13, 2001) (quoting the bankruptcy court in the same case) (internal quotation marks omitted).

<sup>50</sup> FED. R. BANKR. P. 9017.

<sup>51</sup> Wolfson, *supra* note 27, at 5-6.

<sup>52</sup> The absence of a jury has long been associated with an informality about evidentiary matters in bankruptcy court:

As a matter of history, bankruptcy has a tradition of laxity about matters of evidence. There is a tradition in bankruptcy wryly nicknamed “testimony from the podium,” describing situations in which the judge bases her decision upon attorney proffer rather than sworn testimony (“Your honor, if called to testify, my client would say . . .”).

contested matters is often introduced by affidavit or declaration rather than oral presentation in open court.<sup>53</sup> All of this, of course, can speed up the process.

In addition, bankruptcy judges may be more likely than district judges to advise the lawyers, as a cost-cutting measure, that they are not required to brief a particular issue on which the judge has previously issued a written decision.<sup>54</sup> One bankruptcy judge “suspect[s] this is [in part] due to the fact that [ban-

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Our observation is that practice has tightened up some in recent years, and that the judge will often compel counsel in bankruptcy proceedings to comply with basic evidentiary rules just as in any other court. In fact, a litigator who has a firm grasp of the rules of evidence will often have a distinct advantage over her bankruptcy counterparts, simply because bankruptcy lawyers tend to be less familiar with the rules of evidence.

Nevertheless, practice remains a bit more fluid and informal in many bankruptcy courts compared to what you would encounter in federal district or state trial courts. One possible reason for this is the general absence of juries; because there is no jury to poison, the judge may simply permit witnesses to tell their stories, confident in his ability to later disregard any inadmissible portions. Another explanation is that bankruptcy judges tend to look for practical business solutions and may be more concerned about reaching a commercially appropriate result than being bogged down with a “technical” dispute about the admissibility of any particular piece of evidence.

As you might expect, lawyers will encounter substantial variation among judges with regard to the level of formality in their courtrooms and the extent to which they require strict compliance with the rules of evidence or demand complete evidentiary records to support factual findings.

*Overview of Bankruptcy Litigation*, *supra* note 8, at 46.

<sup>53</sup> AHERN & MACLEAN, *supra* note 23, § 9014:1 (“[E]vidence in an adversary proceeding must be presented orally in open court . . . while evidence in a contested matter may be presented on affidavits.”); 10 COLLIER ON BANKRUPTCY, *supra* note 23, ¶ 9014.06 (“[D]isputed factual matters may be resolved on affidavits, but only ‘by agreement of the parties.’”) (quoting FED. R. BANKR. P. 9014, advisory committee’s note to 2002 amendment); 8 NORTON & NORTON, *supra* note 19, § 160:5 (“[S]ome courts permit introduction of evidence in contested matters by affidavit; whereas, evidence in adversary proceedings typically requires oral presentation in open court.”); 2 HOWARD J. STEINBERG, BANKRUPTCY LITIGATION § 8.4 (2d ed. 2007) (“In many instances, the hearing [on a contested matter] is similar to hearings on motions that are brought in federal district court and it is not uncommon for testimony to be introduced by means of declaration rather than through live witnesses.”); Wolfson, *supra* note 27, at 6 (“Offers of proof are often used in bankruptcy cases in lieu of testimony, particularly in contested matters.”). “Most contested matter hearings are resolved following the parties’ oral argument. However, bankruptcy judges have discretion whether to allow oral argument at a hearing.” 1 STEINBERG, *supra* note 34, § 6:21. Similarly, most courts hold that district court judges have discretion to deny oral argument on motions for summary judgment. *See* FED. R. CIV. P. 78(b) (“By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.”); Langham-Hill Petroleum, Inc. v. S. Fuels Co., 813 F.2d 1327, 1330 (4th Cir. 1987); Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 411 (1st Cir. 1985); Spark v. Catholic Univ. of Am., 510 F.2d 1277, 1280 (D.C. Cir. 1975); Parish v. Howard, 459 F.2d 616, 620 (8th Cir. 1972). *But see* Dredge Corp. v. Penny, 338 F.2d 456, 461–62 (9th Cir. 1964) (“[A] district court may not, by rule or otherwise, preclude a party from requesting oral argument nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied.”). And there is some authority for denying opening and closing argument at trial. 75A AM. JUR. 2D Trial § 447 (2007); E-mail from Janice M. Karlin, U.S. Bankr. Judge, Dist. of Kan., to Stephen J. Ware, Professor of Law, Univ. of Kan. (June 16, 2010) [hereinafter Karlin E-mail] (on file with author).

<sup>54</sup> *See* Karlin E-mail, *supra* note 53.

krupcty judges] do see some repeat issues . . . more frequently than do our colleagues on the district court bench.”<sup>55</sup>

The expedited pace of bankruptcy litigation continues at the appellate stage, as appeals of bankruptcy court orders<sup>56</sup> tend to be quicker than appeals of other courts’ decisions.<sup>57</sup> For example, in non-bankruptcy civil litigation in federal court, the usual time to file a notice of appeal is thirty days,<sup>58</sup> while the time to appeal from a bankruptcy order is only fourteen days.<sup>59</sup>

### C. Summary

Compared to ordinary civil litigation under the Federal Rules, bankruptcy litigation uses procedures well-suited to providing quicker and cheaper adjudication, with correspondingly lower process costs. Bankruptcy’s most common form of litigation, the contested matter, uses an abbreviated motion-type process that proceeds quickly to a hearing, with less discovery than occurs in ordinary civil litigation. Likely, another factor is a culture of bankruptcy litigation that, compared to other litigation, places a greater emphasis on saving time and money.

## III. ARBITRATION PROCEDURE

### A. The Basic Context

Arbitration, like litigation, is a form of binding adjudication.<sup>60</sup> Litigation is adjudication in a public (government) forum and arbitration is adjudication in a private forum.<sup>61</sup> Judges and jurors are the adjudicators in litigation, while arbitrators, private individuals chosen by the disputing parties,<sup>62</sup> are the adjudicators in arbitration.

Litigation is the default process of dispute resolution; that is, parties can contract into alternative processes of dispute resolution, but if they do not do

<sup>55</sup> *Id.*

<sup>56</sup> In some federal circuits, bankruptcy court decisions are appealed to the district court, while in others they are appealed to the Bankruptcy Appellate Panel. *See, e.g.*, 1 COLLIER ON BANKRUPTCY ¶ 5.02[3][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).

<sup>57</sup> KANE, *supra* note 33, at 57.

<sup>58</sup> FED. R. APP. P. 4(a)(1)(A).

<sup>59</sup> FED. R. BANKR. P. 8002(a).

<sup>60</sup> *See, e.g.*, ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 21 (4th ed. 2006) (“‘Adjudication’ refers to the process by which final, authoritative decisions are rendered by a neutral third party who enters the controversy without previous knowledge of the dispute.”); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (“[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected [disputing] party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”).

Non-binding arbitration is a very different animal. *See* WARE, PRINCIPLES, *supra* note 7, § 4.32 (discussing the attributes of non-binding arbitration). “Non-binding arbitration has less in common with arbitration than it does with mediation and other processes in aid of negotiation.” *Id.* § 2.2.

<sup>61</sup> *See generally* RAU, *supra* note 60, at 596-620 (describing the process of arbitration); *see also* 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 2.6.1 n.1 (1994) (describing arbitration as a “form of adjudication.”).

<sup>62</sup> *See* WARE, PRINCIPLES, *supra* note 7, § 2.36(a) (summarizing arbitrator selection).

so, then each party retains the right to have the dispute resolved in litigation. By contrast, a dispute does not go to arbitration unless the parties have contracted to have an arbitrator resolve that dispute.<sup>63</sup> In other words, arbitration binds only those who contracted for it.<sup>64</sup>

Just as contracts largely determine which *disputes* will be resolved in arbitration, they also largely determine which *procedures* will be used to resolve those disputes. While the rules of procedure and evidence in litigation are enacted by government, in arbitration they are, “with few exceptions, whatever the parties’ arbitration agreement says they are.”<sup>65</sup> For this reason, arbitration has been described as “the parties’ dream.”<sup>66</sup>

While parties could take the time to negotiate and draft an entire set of procedural rules customized for their arbitration, most parties instead use “off-the-rack” rules previously written by an arbitration organization like the American Arbitration Association (AAA).<sup>67</sup> For example, many pre-dispute arbitration agreements commit the parties to arbitrate according to the AAA Commercial Arbitration Rules.<sup>68</sup> As the AAA Commercial Rules are common

<sup>63</sup> See, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”) (internal quotation marks omitted); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties . . .”). Non-contractual arbitration is less common and often must be non-binding in order to avoid violating the constitutional right to jury trial. See WARE, PRINCIPLES, *supra* note 7, §§ 2.2, 2.55.

<sup>64</sup> See WARE, PRINCIPLES, *supra* note 7, § 2.3(a). Contracting for arbitration can occur pre- or post-dispute:

Sometimes parties with an existing dispute contract to send that dispute to arbitration. Such *post-dispute* arbitration agreements (or “submission agreements”) are relatively rare and non-controversial. More common, and more controversial, are *pre-dispute* arbitration agreements. These are contracts containing a clause providing that, if a dispute arises, the parties will resolve that dispute in arbitration, rather than litigation. These arbitration clauses typically are written broadly to cover any dispute the parties’ transaction might produce, but also can be written more narrowly to cover just some potential disputes.

*Id.* (footnotes omitted).

<sup>65</sup> WARE, PRINCIPLES, *supra* note 7, § 2.35.

<sup>66</sup> “The arbitration of an existing dispute is the parties’ dream, and they can make it what they want it to be.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 310 (1994). There are, however, limits on the parties’ freedom of contract. If the arbitration occurs and does not meet a court’s definition of a “fundamentally fair hearing” then the court will grant a motion to vacate the arbitration award (i.e. overturn the arbitrator’s ruling). WARE, PRINCIPLES, *supra* note 7, § 2.44(c). Also, courts have refused to send some disputes to arbitration when they believe the agreed-upon procedures for arbitration are unfair. *Id.* § 2.35.

<sup>67</sup> 1 MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 8:22 (3d ed. 2010) (“The majority of arbitration clauses in general commercial contracts might well follow the language of a clause suggested by the American Arbitration Association: [quoting the clauses quoted *infra* note 70]”); Stephen L. Hayford, *Building a More Perfect Beast: Rethinking the Commercial Arbitration Agreement*, 7 DEPAUL BUS. & COM. L.J. 437, 440 (2009) (“[In the drafting of commercial contracts,] designation of a neutral arbitration provider (e.g., the Judicial Arbitration and Mediation Services, Inc. . . . or the American Arbitration Association . . .) and the concomitant accession to the proper variant of that provider’s commercial arbitration rules is the norm.”).

<sup>68</sup> *Commercial Arbitration Rules & Mediation Procedures*, AM. ARB. ASS’N (2009), <http://www.adr.org/sp.asp?id=22440> [hereinafter AAA *Commercial Arbitration Rules*] (providing a

and fairly typical of other arbitration rules, they will be used below as examples illustrative of typical procedural rules in arbitration. Compared to ordinary civil litigation under the Federal Rules, the AAA Commercial Rules are well-suited to providing quicker and cheaper adjudication, with correspondingly lower process costs.

## B. *Specific Procedures*

### 1. *Pleadings and Summary Judgment Motions*

The complaint and answer in litigation have their analogs in arbitration, although the complaint is typically called a *demand* for arbitration.<sup>69</sup> Importantly, arbitration pleadings can be produced at lower cost than litigation pleadings because the pleadings in arbitration tend to be written more concisely, with less legalese, than those in litigation. As one nationally-known arbitrator and co-author put it, “[a] statement of Claim or Demand for Arbitration is a far different document than a Complaint in litigation. A claim is much more informal than a pleading and is usually much shorter. There are virtually no ‘rules of pleading’ in arbitration . . . [and] technical pleading rules need not be followed.”<sup>70</sup>

Compared to ordinary civil litigation, arbitration also typically proceeds faster by omitting the summary judgment motion, which is less common in arbitration than in litigation.<sup>71</sup> While summary judgment is relatively rare in arbitration, the speed and efficiency of summary judgment can be achieved in arbitration, as in bankruptcy’s contested matters,<sup>72</sup> by simply forgoing an evidentiary hearing. Courts have enforced awards by arbitrators who decided to forgo live testimony, thus having the hearing on the documentary evidence sub-

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standard arbitration clause: “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”).

<sup>69</sup> WARE, PRINCIPLES, *supra* note 7, § 2.36(b).

<sup>70</sup> Richard Chernick & Rufus V. Rhoades, *How to Conduct a Complex Financial Arbitration Part 1: Matters to Consider Prior to the Hearings*, in SECURITIES ARBITRATION 2004: A RAPIDLY EVOLVING PROCESS 453, 456 (Practising Law Instit. ed., 2004).

<sup>71</sup> See, e.g., *In re Eastern Air Lines, Inc.*, 79 Lab. Arb. Rep. (BNA) 61, 64 n.3 (1983) (“[A] summary judgment is extraordinary (although not unheard of) in arbitration proceedings.”); Gary W. Jackson, *Prosecuting Class Actions in Arbitration*, in 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 829 (2006); Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 175 (2005) (“There is an unspoken bias in [securities] arbitrations that panels should view dispositive motions with much skepticism and proceed as a matter of course to a hearing.”); Harold M. Brody & Anthony J. Oncidia, *Careful What You Wish For: Is Arbitration the Employer’s Panacea? Perhaps There is a Better Alternative*, HR ADVISOR: LEGAL & PRAC. GUIDANCE, Nov.-Dec. 2003, at 7, 8; Leslie A. Gordon, *Clause For Alarm: As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach*, A.B.A. J., Nov. 2006, at 19, 19; Sanford F. Young, *Conventional Wisdoms or Mistakes: The Complaint and the Response*, N.Y. ST. B.A. J., June 2004, at 28, 29 (“[A]rbitrations are rarely, if ever, resolved by pre-hearing dispositive motions (e.g., dismissal or summary judgment).”).

<sup>72</sup> See *supra* text accompanying notes 36-37.

mitted.<sup>73</sup> That said, the gist of most arbitration practice, like contested-matter practice in bankruptcy,<sup>74</sup> is to proceed quickly to a hearing with fewer filings (pleadings and motions) than precede a trial in ordinary civil litigation.

## 2. Discovery

Arbitration, like a contested matter in bankruptcy,<sup>75</sup> generally expedites and reduces discovery. However, the gap between discovery in litigation and arbitration seems to be shrinking. Seventeen years ago, the leading arbitration treatise said: "Limitations on discovery, particularly judicially initiated discovery, remain one of the hallmarks of American commercial arbitration . . . ."<sup>76</sup> Now, though, one of the authors of that treatise says:

Arbitration hearings are now often preceded by extensive discovery, including depositions. Because discovery has traditionally accounted for the bulk of litigation-related costs, the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery, it is not unusual for legal advocates to agree to trial-like procedures for discovery, even to the extent of employing standard civil procedural rules.<sup>77</sup>

Although arbitration discovery seems to be catching up to litigation discovery, it has apparently not caught up yet, according to the bulk of observ-

<sup>73</sup> See, e.g., *British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 517 (S.D.N.Y. 2000). As one federal court explained:

Oral argument is not a necessary component of due process in all circumstances. While hearings are advisable in most arbitration proceedings, arbitrators are not compelled to conduct oral hearings in every case. The lack of oral hearings does not amount to the "denial of fundamental fairness" required to warrant vacating the award. As long as an arbitrator's choice to render a decision based solely on documentary evidence is reasonable, and does not render the proceeding "fundamentally unfair," the arbitrator is acting within the liberal sphere of permissible discretion.

*Id.* (citations omitted) (internal quotation marks omitted); see also UNIF. ARBITRATION ACT § 15 cmt. 3, 7 U.L.A. 58 (2009) (noting numerous courts have upheld an arbitrator's authority to grant a summary disposition); *Burdette v. FSC Sec. Corp.*, No. 92-1030, 1993 WL 593997, at \*5 (W.D. Tenn. Dec. 15, 1993) (confirming an arbitral award in the nature of summary judgment); *Intercarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 74 (S.D.N.Y. 1993) (confirming an award after the arbitrator refused to conduct oral hearing despite party's repeated requests); *Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr. 2d 650, 660-61 (Cal. Ct. App. 1995) (upholding an AAA arbitral award based on summary adjudications); AAA *Commercial Arbitration Rules*, *supra* note 68, at E-6 ("Where no party's claim exceeds \$10,000, exclusive of interest and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents."). Professor Lisa Bernstein explains that the absence of a live hearing is the norm in arbitration in the cotton industry. See Bernstein, *supra* note 16, at 1728 ("The [industry arbitration tribunal] does not hold hearings. It decides cases solely on the basis of briefs and documentary evidence . . . .").

<sup>74</sup> See *supra* Part II.B.1.

<sup>75</sup> See *supra* Part II.B.2.

<sup>76</sup> 1 MACNEIL ET AL., *supra* note 61, § 34.1.

<sup>77</sup> Stipanowich, *supra* note 13, at 12 (footnotes omitted).

ers.<sup>78</sup> This may be because arbitrators tend to be more willing than judges to intervene in discovery disputes and curtail discovery of marginally relevant material.<sup>79</sup>

### 3. *Hearing and Appeal*

Arbitration hearings, like hearings of contested matters in bankruptcy,<sup>80</sup> tend to be faster and less elaborate than trials in ordinary civil litigation. As noted above,<sup>81</sup> the rules of evidence tend not to be strictly enforced in bankruptcy hearings and this point is even more generally true of arbitration hearings.<sup>82</sup> The AAA Commercial Rules state that “[c]onformity to legal rules of evidence shall not be necessary.”<sup>83</sup> In arbitration, as in bankruptcy contested matters,<sup>84</sup> evidence is often introduced by affidavit or declaration, rather than oral presentation in open court.<sup>85</sup> Relatedly, arbitration can reduce process

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<sup>78</sup> See, e.g., 3 THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION § 89.1 (3d ed. 2009) (describing the discovery process in arbitration as “skeletal if not missing.”). A party seeking discovery generally must meet a higher burden in arbitration than in litigation:

The standard for arbitration discovery is necessity, not convenience. This is a departure from the standard in trial practice where one need only show that the discovery request, if fulfilled, may uncover potentially relevant and material evidence. Courts strongly favor liberal discovery. In arbitration, however, the presumption is reversed and a convincing case must be made that the information sought is essential.

*Id.* § 89.3; see also DRAHOZAL, *supra* note 11, at 418-19 (“Sophisticated commercial parties who agree to arbitration are willing to trade a reduced ability to discover facts in the other side’s possession for a reduction in litigation costs.”); Bruce A. McAllister & Amy Bloom, *Evidence in Arbitration*, 34 J. MAR. L. & COM. 35, 42 (2003) (“It is axiomatic that discovery is not as available in arbitration as it may be in court litigation.”); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1268 (2009) (“[L]imits on discovery (and to a lesser extent on pretrial motion practice) hold down the actual costs of arbitration relative to litigation.”).

<sup>79</sup> See Gale R. Peterson, *Trade Secret Law Update 2008: Including Restrictive Post-Employment Covenants*, in PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY, at 799, 943 (Practising Law Inst. ed., 2008). Several factors influence an arbitrator’s role in the discovery process:

Astute arbitrators, not bound by the Federal Rules of Civil Procedure (or similar state court rules), and who, unlike federal and state court judges, are being paid for their time, typically on a hourly rate, have more incentive for acting to curtail unnecessary discovery. . . . Thus, some arbitrations are well-managed—some are not—but well-manage[d] arbitrations have the ability to pare down the mountains of discovery to manageable levels.

*Id.*

<sup>80</sup> See *supra* Part II.B.3.

<sup>81</sup> See *supra* text accompanying notes 50-52.

<sup>82</sup> “In many arbitrations, there are no rules of evidence. The parties can present whatever evidence they like and the arbitrators can give to it whatever weight they like.” WARE, PRINCIPLES, *supra* note 7, § 2.37(c). On the other hand, Professor Thomas L. Stipanowich lists the tendency of arbitrators “to be very liberal in the admission of evidence” as a factor that may prolong hearings. Stipanowich, *supra* note 13, at 15.

<sup>83</sup> AAA Commercial Arbitration Rules, *supra* note 68, at R-31.

<sup>84</sup> See *supra* text accompanying note 53.

<sup>85</sup> Bernstein, *supra* note 16, at 1728 (“The [cotton industry arbitration tribunal] does not hold hearings. It decides cases solely on the basis of briefs and documentary evidence, most commonly: verified copies of confirmations, correspondence, mail receipts, telephone logs, weight slips, quality determination reports, and affidavits from lawyers and employees who played roles in the questioned transaction.”) (emphasis added); Ariana R. Levinson, *Lawyer-*

costs by having direct examinations of witnesses presented to the arbitrator prior to the hearing, with the hearing “then limited to cross-examination, and any redirect examination. Doing so offers the benefit of reducing hearing/trial time.”<sup>86</sup>

Another factor often cited as a reason why arbitration hearings tend to be completed faster than trials is that the arbitrators tend to be more willing and able than judges to conform to the parties’ preferred schedule. This deference to the parties’ schedule also saves lawyers from the cost of preparing for trial and then, if the court reschedules the trial, having to prepare again.<sup>87</sup> As one trial lawyer explains, “[a]rbitration moves faster than trial as the arbitrators rarely have any other substantial business to take care of during the arbitration. There is no waiting for the last juror who missed his bus to arrive, ten minute breaks are rarely more than 15 minutes long, and arbitrators are not shy about telling you [the lawyer presenting a case] to move on.”<sup>88</sup>

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*ing Skills, Principles and Methods Offer Insights as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1, 45 (2008) (“In some arbitrations, parties submit the entire case, or parts of the case, in written form. Some have suggested that all direct testimony should be submitted on paper with only live cross-examination. Others have suggested that only key witnesses should be presented live, with others being presented in paper form.”) (footnotes omitted); Robert A. Merring, *Discovery in Contractual Arbitrations: “What Do You Mean I Can’t Serve Interrogatories?”*, ORANGE COUNTY LAW., June 2006, at 18, 18 (“That most arbitrations do not apply the formal rules of evidence, and allow the use of affidavits, declarations, and telephonic testimony, also obviate the need for much traditional discovery.”); Edna Sussman, *Why Arbitrate? The Benefits and Savings*, N.Y. ST. B.A. J., Oct. 2009, at 20, 24 (“The conduct of the hearing can be expedited by (1) presenting direct testimony by affidavit; (2) limiting the time available for the hearing and, if appropriate, using the “chess clock method” to assure equal time; (3) using telephone and video conferencing technology; (4) choosing a hearing location that minimizes expenses to the parties; (5) conferencing or “hot tubbing” the experts; (6) using a single expert to advise the arbitrators rather than having the parties offer competing experts; and (7) limiting post-hearing submissions.”); Young, *supra* note 71, at 29 (“[R]ules of evidence are generally only loosely applied, with hearsay statements (including affidavits) and documents usually freely admitted.”); *see also* AAA *Commercial Arbitration Rules*, *supra* note 68, at R-32 (“The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission. . . . If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.”).

<sup>86</sup> Peterson, *supra* note 79, at 944.

<sup>87</sup> *Id.* Unlike litigation, arbitration is generally free of scheduling issues and associated delays and costs:

An undeniable advantage of arbitration . . . is that the parties for the most part are able to choose the timing and length of the hearing/trial, which renders scheduling easier than waiting on a court “call docket” for trial on relatively short prior notice. In jurisdictions with congested court dockets, the time to hearing/trial may be substantially shortened, but also counsel do not need to prepare for trial—and then prepare again for trial when a first setting is passed, and so on, and so on. Costs and delay may be reduced for that reason as well.

*Id.*

<sup>88</sup> Mark L.D. Wawro, *Advocacy in Arbitration: Article 2—Practitioner’s Perspective*, ADVOC., Winter 2003, at 42, 44; *see also* DRAHOZAL, *supra* note 11, at 28 (“Another reason why arbitration might result in faster dispute resolution than litigation is that it enables the parties to avoid a queue. In court, a lawsuit is added to the judge’s docket behind previously



Finally, arbitrators often have expertise on the subject matter of the dispute, and this expertise may relieve the lawyers of the need to lay the sort of factual and evidentiary foundations required in court.<sup>89</sup> (This is yet another similarity between arbitration and bankruptcy litigation because bankruptcy judges hear only bankruptcy cases and thus develop an expertise in the subjects that frequently recur in bankruptcy cases.)

Compared to ordinary civil litigation, arbitration's speed continues at the decision and appeal stages. Arbitrators' decisions, called arbitration awards, are generally delivered quickly.<sup>90</sup> For example, the AAA Commercial Rules require the arbitrator to deliver the award within 30 days from the end of the hearing.<sup>91</sup> This shortened time frame is easier for an arbitrator than a judge because unlike judicial decisions, commercial arbitration awards rarely contain any reasoning.<sup>92</sup> Similar to the typical jury verdict, the typical arbitration

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filed cases. In arbitration, if the parties wish, they can choose an arbitrator who has no backlog, or at least less of a backlog than there would be in court.”).

<sup>89</sup> Jackson Williams & Morgan Lynn, *Public Citizen Releases the Costs of Arbitration*, PIABA B.J., Summer 2002, at 49, 51 (“Relaxing the rules of evidence to permit hearsay testimony, such as testimony by affidavit or deposition, or the use of business records without ‘foundation’ testimony, can shorten proceedings.”).

<sup>90</sup> 1 DOMKE, *supra* note 67, at § 34.1 (3d ed. 2010). The amount of time an arbitrator is given to make a decision is largely determined by the parties themselves:

The parties to an arbitration fix the time within which an award must be made, either by a specific agreement or by accepting the rules of an agency referred to in their arbitration clause. Parties enjoy considerable freedom in this regard. For example, provision that the award be rendered within five days after the appointment of the third arbitrator was not considered “unworkable” since it was consistent “with one of the principal purposes of arbitration which is to reach a speedy final result to avoid protracted litigation.” Time limits which the parties have set may usually not be altered by the arbitrator or the administrator of arbitration because it would amount to an alteration of the parties’ contract by a nonparty to the contractual agreement.

*Id.* (quoting *Joseph F. Mittelman Corp. v. Murray L. Spies Corp.*, 129 N.Y.S.2d 822, 828 (N.Y. Sup. Ct. 1954)).

<sup>91</sup> AAA *Commercial Arbitration Rules*, *supra* note 68, at R-41. “[P]arties sometimes underscore their wish for an expedited result by providing in the arbitration clause, for example, that there will be an award within a specified number of months of the notice of intention to arbitrate and that the arbitrator(s) must agree to the time constraints before accepting appointment.” AM. ARBITRATION ASS’N, DRAFTING DISPUTE RESOLUTION CLAUSES—A PRACTICAL GUIDE 32 (2007), available at <http://www.adr.org/si.asp?id=4125>.

<sup>92</sup> See AAA *Commercial Arbitration Rules*, *supra* note 68, at R-42(b) (“The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.”); 1 MACNEIL ET AL., *supra* note 6, §§ 3.2.3, 37.4.1; Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 512 (2005) (“[A]rbitrators—particularly in commercial cases—are not expected to write reasoned opinions attempting to explain and justify their decisions, and the AAA in fact has traditionally discouraged them from doing so.”); Catherine A. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L.J. 341, 367 (2007) (“[D]omestic tribunals routinely issue awards that do not include articulated reasons.”).

While commercial arbitration in the United States generally does not produce a reasoned award, “ICSID and labor arbitration depart radically from this model, and international commercial arbitration departs to a lesser degree.” W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1914 (2010); see also 2 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2450-51 (2009) (“It is now a nearly universal principle that international arbitral awards must set forth the reasons for the tribunal’s decision, as well as containing a dispositive section specifying the relief ordered

award consists of a few sentences finding liability and awarding damages to the injured party.<sup>93</sup>

While arbitration awards are not technically “appealed” to courts, they can be vacated by courts.<sup>94</sup> Whether called an “appeal” or not, any process after the initial adjudicator’s decision raises the process costs of adjudication. One way to reduce these costs over the run of cases is for higher courts to affirm the vast majority of decisions by initial adjudicators, to give such initial decisions more finality and thus deter parties from appealing. This has generally been the case with courts’ treatment of arbitration awards.<sup>95</sup> The Federal Arbitration Act’s grounds for vacating an arbitration award are narrow,<sup>96</sup> so vacatur is quite rare.<sup>97</sup>

### C. Summary

Compared to civil litigation under the Federal Rules, arbitration tends to be quicker and cheaper with correspondingly lower process costs. These savings come from a process that proceeds more quickly to a hearing, with less elaborate pleadings, discovery and motion practice than occur in ordinary civil litigation. Likely, other savings come from arbitrators accommodating parties’ schedules more than judges do.

## IV. QUESTIONS SUGGESTED BY THE SIMILARITIES BETWEEN ARBITRATION AND BANKRUPTCY LITIGATION

### A. Any Lessons for Ordinary Civil Litigation under the Federal Rules?

If bankruptcy litigation and arbitration are quicker and cheaper than ordinary civil litigation under the Federal Rules, should the Federal Rules be amended to more resemble the practice in bankruptcy and arbitration?<sup>98</sup> This

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by the tribunal. This requirement for a reasoned award is reflected in international arbitration conventions, national law and institutional rules, and plays a central role in the international arbitral process.”); *Employment Arbitration Rules and Mediation Procedures*, AM. ARB. ASS’N, R. 39(c) (Nov. 1, 2009), <http://www.adr.org/sp.asp?id=32904#39> (“The award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise. It shall be executed in the manner required by law.”).

<sup>93</sup> WARE, PRINCIPLES, *supra* note 7, § 2.37(e); *see also* Weidemaier, *supra* note 92, at 1914 (“Unreasoned awards do not find facts, state conclusions of law, offer reasons, or provide any information relevant to future disputes beyond certain basic facts: a dispute happened, it involved parties A and B, and party A won.”).

<sup>94</sup> *See* 9 U.S.C. § 10(a) (2006) (providing grounds for vacating an arbitration award).

<sup>95</sup> Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 592 (2007) (“[L]imited appellate review encourages finality and discourages parties from pursuing dubious, costly appeals”); Williams & Lynn, *supra* note 89, at 52 (“Public Citizen agrees that proponents of arbitration are undoubtedly correct that the limited, narrow grounds upon which an arbitration award can be appealed will reduce litigation costs. Parties will avoid paying court reporters to record or transcribe hearings or appellate attorneys to write briefs.”).

<sup>96</sup> 9 U.S.C. § 10(a).

<sup>97</sup> WARE, PRINCIPLES, *supra* note 7, § 2.43(a).

<sup>98</sup> A few thoughtful articles have, as Professor Michael Moffitt says, “suggested that the civil litigation system might have some things to learn from some of the customizing aspects

may not be entirely possible for several reasons, including the civil jury. While a civil jury trial rarely, if ever, occurs in a bankruptcy contested matter<sup>99</sup> or in arbitration,<sup>100</sup> the Seventh Amendment and its state constitutional equivalents guarantee a civil jury trial in much ordinary civil litigation.<sup>101</sup> Some of the ways in which the Federal Rules require more elaborate procedures than those used in bankruptcy litigation or arbitration can be traced to the civil jury. Examples include broad discovery and complex rules of evidence.<sup>102</sup> To the extent jury trials require more elaborate procedures than occur in bankruptcy litigation or arbitration, the Federal Rules are hindered in attempts to foster quicker and cheaper adjudication.

Even if the Federal Rules could be amended to resemble the procedures of bankruptcy litigation and arbitration, such an amendment may not be desirable. Perhaps the more-elaborate procedures of the Federal Rules are more appropriate for the types of disputes typically resolved in ordinary civil litigation, while the less-elaborate procedures of bankruptcy and arbitration are more appropriate for the types of disputes typically resolved in those fora. In other words, perhaps these various adjudication procedures are doing pretty well at achieving the ADR movement's goal of "fitting the forum to the fuss."<sup>103</sup> Some

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of arbitration." Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25, 46 n.35 (2010) (citing Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007); Henry S. Noyes, *supra* note 95; Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181 (2006)). Earlier scholars pointed out that "arbitration procedures can be used as a criterion for evaluating the efficiency of the public judicial system." William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 249 (1979).

<sup>99</sup> See, e.g., *Diamant v. Kasparian (In re S. Cal. Plastics, Inc.)*, 165 F.3d 1243, 1248 (9th Cir. 1999) ("[B]ecause the allowance of a claim is a contested matter, the proceeding is before the bench not a jury."); WILLIAMS, *supra* note 30, § 18:8 ("These matters are disposed of through a summary hearing—not a trial, and are heard in bankruptcy court without any suggestion of a jury right. These types of proceedings are called contested matters . . ."). Contested matters are unlikely to be actions at law, to which the jury-right attaches, as opposed to actions in equity. See *supra* note 31 and accompanying text (listing common contested matters). Even a creditor's money-damages claim against the debtor in bankruptcy, like the paradigm breach-of-contract claim discussed *supra* text accompanying notes 10-11, is on the equity, rather than law, side. See Stephen J. Ware, *Bankruptcy Law's Treatment of Creditors' Jury-Trial and Arbitration Rights*, 17 AM. BANKR. INST. L. REV. 479, 483-84 (2009). Other bankruptcy litigation very rarely leads to a civil jury trial.

<sup>100</sup> I suppose it theoretically could occur if an agreement provided that the arbitration panel would be a dozen random citizens.

<sup>101</sup> U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

<sup>102</sup> Stephen J. Ware, *Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury*, 56 U. MIAMI L. REV. 865, 868-70 (2002).

<sup>103</sup> This phrase was apparently coined by "the late Columbia University School of Law professor and judicial reform advocate Maurice Rosenberg." Carrie Menkel-Meadow, *Maintaining ADR Integrity*, ALTERNATIVES, Jan. 2009, at 1, 7; see also Maurice Rosenberg, *Let the Tribunal Fit the Case*, Introductory Remarks at the American Association of Law Schools Symposium: Current Developments in Judicial Administration (Dec. 28, 1977), in 80 F.R.D. 147, 166 (1977) (advocating "let[ting] the forum fit the fuss" by "establishing criteria for channeling matters into dispute resolution mechanisms."). Seminal cites include Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994); Frank E.A. Sander, *Varieties*

disputes are suited to a quick and cheap process, while other disputes warrant spending the additional time and money on a more elaborate process. A sensible system would incur larger process costs for larger disputes and smaller process costs for smaller disputes.

This common-sense idea is evident in all three sets of procedures: arbitration, bankruptcy litigation, and ordinary civil litigation. While arbitration tends to be relatively quick and cheap, this is especially so for smaller, more routine, claims and less so for complex, high-dollar disputes. Similarly, while bankruptcy litigation also tends to be relatively quick and cheap, this is especially so for contested matters and less so for adversary proceedings.<sup>104</sup> And while the Federal Rules apply to all cases in federal district court, the state analogs to the Federal Rules tend not to apply in small claims courts and other courts of limited jurisdiction, which generally use a quicker and cheaper adjudication process that more resembles arbitration or bankruptcy litigation.<sup>105</sup> In short, to some extent all three systems adjust, adding or reducing process, to reflect the nature of the particular dispute.

#### *B. How Do Parties Choose between Bankruptcy Litigation and Arbitration?*

This Article has suggested that bankruptcy litigation and arbitration both tend to be quicker and less elaborate, and therefore less expensive, than ordinary civil litigation. If bankruptcy litigation and arbitration share these same procedural virtues, then how do parties choose between bankruptcy litigation and arbitration? For example, why do some parties seek to opt out of bankruptcy litigation and into arbitration? Why would a party want to pay for the arbitration process when a similar process subsidized by the government, bankruptcy litigation, is the alternative?<sup>106</sup>

First, it should be noted that many of the parties who seek to opt out of bankruptcy litigation and into arbitration are seeking to opt out of litigating an adversary proceeding, rather than a contested matter.<sup>107</sup> As explained above, litigation of an adversary proceeding is conducted under procedures similar to the Federal Rules that govern ordinary (non-bankruptcy) civil litigation.<sup>108</sup> So, for these parties, the appeal of arbitration as a substitute for bankruptcy litigation

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*of Dispute Processing*, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 79, 111-14 (1976) (recommending that courts offer parties a range of dispute resolution procedures and help them choose among them).

<sup>104</sup> See *supra* Part II.A.

<sup>105</sup> See, e.g., CAL. CIV. PROC. CODE §§ 116.210-.270 (West 2006) (codifying separate rules of procedure for claims under \$7,500); FLA. SM. CL. R. §§ 7.010-.175 (West 2008) (establishing separate rules of procedure for claims under \$5,000); TEX. GOV'T CODE ANN. §§ 28.001-.055 (West 2004 & Supp. 2010) (setting separate rules of procedure governing justice courts in claims under \$5,000).

<sup>106</sup> See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 451 (2010) ("We start with the expectation that well-informed people do not ordinarily pay thousands of dollars to get what they can get elsewhere for free. So, we ask, why any sophisticated parties choose to do that with respect to binding adjudication. Why do they choose arbitration over litigation?").

<sup>107</sup> See Ware, *supra* note 99, at 487 n.38 (citing cases).

<sup>108</sup> See *supra* text accompanying notes 26-28.

tion may be quite similar to the appeal arbitration has for parties seeking to avoid the elaborate procedures of non-bankruptcy civil litigation.

More difficult to explain, however, is why some parties seek arbitration, rather than litigation, of contested matters in bankruptcy.<sup>109</sup> Contested matters are subject to a less elaborate form of litigation that shares many of the same procedural virtues as arbitration.<sup>110</sup> So we might expect that few parties would seek arbitration, rather than litigation, of contested matters in bankruptcy. And, in fact, relatively few reported cases involve parties seeking arbitration, rather than litigation, of contested matters in bankruptcy.<sup>111</sup> Maybe the bulk of parties who could successfully argue for arbitration of their contested matters choose instead to have these matters remain in court and maybe they do so because they anticipate no process-cost savings from the arbitration alternative.

Other hypotheses might also explain why some parties seek arbitration rather than bankruptcy litigation. Perhaps it is simply a matter of seeking a favorable adjudicator. Perhaps parties seeking arbitration rather than litigation of their contested matters are typically creditors who think arbitrators tend to be more pro-creditor than bankruptcy judges, and bankruptcy judges more pro-debtor than arbitrators. Perhaps these arbitration-seeking creditors also prefer the relative confidentiality of arbitration over the greater openness of bankruptcy litigation.

## V. CONCLUSION

The process of litigating contested matters in bankruptcy courts differs from the process of ordinary civil litigation under the Federal Rules. And the bankruptcy litigation process differs from the Federal Rules in many of the same ways that the arbitration process tends to differ from the Federal Rules. In sum, compared to ordinary civil litigation under the Federal Rules, both bankruptcy litigation and arbitration use procedures well-suited to providing quicker and cheaper adjudication, with correspondingly lower process costs. These savings of time and money are generally achieved through: (1) fewer and shorter pleadings and dispositive motions, (2) expedited and abbreviated discovery, and (3) hearings less attendant to formalities such as rules of evidence. In addition, factors not found in the “law in the books,” such as a culture of speed and cooperativeness among bankruptcy lawyers and arbitrators’ tendency to accommodate parties’ schedules more than judges do, seem to play a role.

The savings achieved in bankruptcy litigation and arbitration may not be available in ordinary civil litigation because of the constitutional right to jury trial. And even if these savings could be achieved by amending the Federal Rules, such an amendment might not be desirable. The more-elaborate procedures of the Federal Rules may be appropriate for the sorts of disputes typically resolved in ordinary civil litigation, while the less-elaborate procedures of

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<sup>109</sup> For examples of cases allowing creditors’ to pursue against debtors in bankruptcy claims that would otherwise have apparently been contested matters, see Ware, *supra* note 99, at 482 n.16.

<sup>110</sup> See *supra* Parts II.B, III.B.

<sup>111</sup> See Ware, *supra* note 99, at 482 n.16 (citing only six cases).

bankruptcy and arbitration may be appropriate for the sorts of disputes typically resolved in those fora.

While these sorts of plausible considerations might explain why the Federal Rules differ from the Bankruptcy Rules and arbitration rules, the similarities between bankruptcy litigation and arbitration leave parties with interesting choices about whether to use arbitration as an alternative to bankruptcy litigation. In particular, questions remain about why some parties choose arbitration over the procedures bankruptcy litigation uses for contested matters.